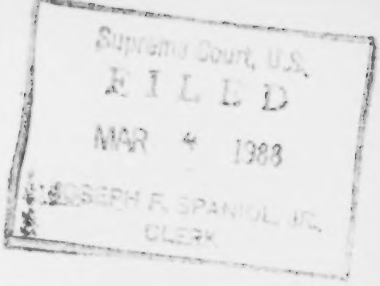
87-1558



NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF OHIO
Petitioner

-vs-

WILLIAM E. MURPHY
Respondent

****

PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of Ohio

****

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Counsel for Petitioner

QUESTIONS PRESENTED

I. WHERE THE POLICE HAVE A SEARCH WARRANT TO SEARCH A PRIVATE HOME FOR EVIDENCE OF DRUG SALES AND A POLICE INFORMANT HAS JUST PURCHASED DRUGS IN THIS HOME WITH $1,000 OF POLICE MARKED MONEY, CAN THE POLICE CONDUCT A WARRANTLESS SEARCH OF THIRD PARTIES WHO WERE IN THE HOME DURING THE DRUG SALE FOR THE MARKED MONEY AND FRISK THEM FOR WEAPONS.

II. SHOULD THE GOOD FAITH EXCEPTION TO THE SEARCH WARRANT REQUIREMENT APPLY TO WARRANTLESS SEARCHES CONDUCTED BY THE POLICE.

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TABLE OF AUTHORITIES

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF OHIO
Petitioner

-vs-

WILLIAM E. MURPHY
Respondent

PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of Ohio

OPINIONS BELOW

The decision of the Supreme Court of the State of Ohio denying jurisdiction is reproduced in the Appendix of the Petition at pages 32-33.

The decision of the Court of Appeals for the Ninth District affirming the judgment of the trial court of Summit County is reproduced in the Appendix of the Petition at pages 34-47.

The decision of the Summit County Court of Common Pleas suppressing the evidence is reproduced in the Appendix at pages 48-49.

JURISDICTIONAL STATEMENT

Petitioner respectfully requests this Court to invoke jurisdiction under 18 U.S.C. 1257(3). The Court of Common Pleas for Summit County on March 12, 1987, suppressed the evidence in this case finding that it was illegally seized under the Fourth Amendment. The decision was affirmed by the Court of Appeals for the Ninth Judicial District on September 30, 1987. The Supreme Court of Ohio refused to take jurisdiction of this case on January 13, 1988. Petitioner prays that this Court grant the Writ of Certiorari for the reasons that state courts in the instant

case have incorrectly decided important federal questions that must be settled by this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions Involved

U.S. Const., Amend. IV

The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATUTES INVOLVED

O.R.C. 2925.11 [Drug Abuse.] Reproduced at Page 40.

STATEMENT OF THE CASE

On December 5, 1986, Detective William Crawford of the Cuyahoga Falls Police Department filed an affidavit for a search warrant for the residence of Thomas M. Bowers. The search warrant authorized the police to search for illegally possessed drugs including marijuana and cocaine. The police were also authorized to search for items used in conducting illegal drug operations including drug paraphernalia, money, miscellaneous records of illegal drug transactions, and any other instrumentalities of illegal drug operations.

The affidavit supporting the search warrant indicated that a reliable confidential informant spoke to Thomas M. Bowers on October 21, 1986. Mr. Bowers offered to sell the informant

one-quarter ounce of marijuana for $45.00. The informant was to purchase the drugs from Mr. Bowers at Mr. Bowers' residence during the evening hours. On October 27, 1986, the confidential informant made a controlled purchase of 14 grams of marijuana in Mr. Bowers' home. During the controlled drug purchase the confidential informant was under constant surveillance by the police. After the drug purchase, the confidential informant gave the marijuana to the police. The marijuana was tested by the Ohio Bureau of Criminal Identification and the results indicated the presence of 14 grams of marijuana.

On November 7, 1986, the confidential informant made a second controlled purchase of drugs. During the late evening hours of November 7, 1986, the confidential informant made a controlled

purchase of cocaine from Mr. Bowers' residence at 519 Magnolia Avenue in Cuyahoga Falls, Ohio. The confidential informant handed over the substance purchased from Mr. Bowers to the police and a test of the substance indicated the presence of cocaine. During the late evening hours of November 13, 1986, the confidential informant conducted a third controlled purchase of drugs from Mr. Bowers at his residence. The informant was electronically wired during this third controlled purchase of drugs. A field test of the drugs purchased from Mr. Bowers indicated the presence of cocaine.

On November 19, 1986, Mr. Bowers offered to sell the informant one-half ounce of cocaine for $1,000.00. The purchase was to be made at a later date in the very near future at 519 Magnolia Avenue, the residence of Mr. Bowers.

Based upon Mr. Bowers' latest offer to sell drugs, the police supplied the informant with $1,000.00 of marked money. On December 5, 1986, the informant was to purchase the one-half ounce of cocaine with the marked money. The police were to conduct a warrant search of Mr. Bowers' home immediately after the drug sale was completed. The police requested a nighttime search of the Bowers' home since Mr. Bowers normally conducts the illegal sale of drugs during the late evening hours past 8:00 p.m.

Based upon the above information contained within the affidavit of Detective Crawford, Judge Bierce of the Cuyahoga Falls Municipal Court issued a search warrant for Mr. Bowers' residence. On December 5, 1986 at approximately 11:50 p.m., the confidential informant purchased one-

half ounce of cocaine from Mr. Bowers' at Mr. Bowers' residence with $1,000.00 of marked money from the police. Immediately after the informant left Mr. Bowers' house, the police executed the search warrant and converged on Mr. Bowers' house. After knocking on the door and announcing their presence, the police entered Mr. Bowers' residence to search his house for drugs, drug paraphernalia, records, and the $1,000.00 of marked money. When the police entered the Bowers home they found five other people besides the Defendant in the house. The police gathered all of the individuals in the house into one room and quickly searched everyone for weapons

The police informed Mr. Bowers that they had a warrant for his arrest and also a warrant to search his house. The police waited approximately 20 minutes

until Detective Crawford arrived before searching Mr. Bowers' residence. One of the individuals found in Mr. Bowers' house was the Defendant, William Murphy. After Detective Crawford arrived, he believed that one of the third parties might be a supplier or buyer of drugs and searched the six people present in the house for the marked money. Prior to searching the Defendant for the drug money, Detective Crawford frisked the Defendant for weapons. When Detective Crawford frisked the Defendant for weapons, he felt a hard object in the Defendant's front trousers and the Defendant immediately jerked back when this object was touched by the police officer. Detective Crawford removed a package of cigarettes from the Defendant's pants and found a small amount of cocaine within this pack of cigarettes. The police then searched

the Defendant and other individuals in the house for the marked money. The police checked any bills the third parties had in their possession to determine whether any of the money was marked money used by the informant. The police failed to find any of the marked money on the individuals who were searched.

After the individuals were searched by the police, the police found the $1,000.00 of marked bills in the lounge where everyone had been searched. The money was found laying on the floor underneath a desk. In the subsequent search of Mr. Bowers' residence, the police seized several packages of cocaine, weights, weight scales, plastic baggies, marijuana, and various other drug paraphernalia. Based on the cocaine that was found in the Defendant's possession, the Defendant

was charged with one count of Drug Abuse.

The Defendant was indicted for one count of Drug Abuse, a violation of O.R.C. 2925.11. On February 17, 1987, the Defendant filed a motion to suppress evidence that was seized by the police. On March 10, 1987, the trial court held a hearing on the Defendant's motion to suppress and received evidence on this matter. During this suppression hearing the trial court indicated that Ybarra v. Illinois, 444 U.S. 85 (1979) was the controlling case on the Defendant's arguments. On March 17, 1987, the trial court granted the Defendant's motion to suppress. The State appealed the trial court's ruling granting the Defendant's motion to suppress to the Ninth District Court of Appeals which affirmed the ruling of the trial court.

On January 13, 1988, The Ohio Supreme Court refused to take jurisdiction of this case. The State now seeks a Petition for a Writ of Certiorari from this Court.

FIRST REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD DETERMINE WHETHER THE HOLDING OF YBARRA V. ILLINOIS, 444 U.S. 85 (1979) APPLIES TO WARRANT SEARCHES OF PRIVATE HOMES WHERE THE DEFENDANT IS SELLING DRUGS FROM HIS HOME TO THIRD PARTIES.

The State contends the trial court committed error in granting the Defendant's motion to suppress. Although the court did not file Findings of Fact and Conclusions of Law, it is apparent from the record that the court believed that Ybarra v. Illinois, 444 U.S. 85 (1979) was controlling in this case and therefore suppressed the evidence. The Ybarra court stated in its syllabus:

> The searches of appellant and the seizure of what was in his pocket contravened the Fourth and Fourteenth Amendments. Pp. 90-96.
>
> (a) When the search warrant was issued the authorities had no probable cause to believe that any person found in the tavern, aside from the

bartender, would be violating the law. The complaint for the warrant did not allege that the tavern was frequented by persons illegally purchasing drugs or that the informant had ever seen a patron of the tavern purchase drugs from the bartender or any other person. And probable cause to search appellant was still absent when the police executed the warrant; upon entering the tavern, the police did not recognize appellant and had no reason to believe that he had committed, was committing, or was about to commit any offense. The police did possess a warrant based on probable cause to search the tavern where appellant happened to be when the warrant was executed, but a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person, Sibron v. New York, 392 U.S. 40, 62-63. Although the warrant gave the officers authority to search the premises and the bartender, it gave them no authority to invade the constitutional protections possessed individually by the tavern's customers. Pp. 90-92.

(b) Nor was the action of the police constitutionally

permissible on the theory that the first search of appellant constituted a reasonable frisk for weapons under the doctrine of Terry v. Ohio, 392 U.S. 1, and yielded probable cause to believe that appellant was carrying narcotics, thus justifying the second search for which no warrant was required in light of the exigencies of the situation coupled with the ease with which appellant could have disposed of the illegal substance. A reasonable belief that a person is armed and presently dangerous must form the predicate to a patdown of the person for weapons. Here, the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that appellant was armed and dangerous. Pp. 92-93.

(c) The Fourth and Fourteenth Amendments will not be construed to permit evidence searches of persons who, at the commencement of the search, are on "compact" premises subject to a search warrant, even where the police have a "reasonable belief" that such persons "are connected with" drug trafficking and "may be concealing or carrying away the contraband." Cf. United States v. Di Re, 332 U.S. 581. Pp. 94-96.

The State contends the facts of Ybarra are distinguishable from the facts in the instant case and therefore the holding of Ybarra should not be followed. In Ybarra, a reliable confidential informant had observed the bartender of the Aurora Tap Tavern with 25 tin foil packets on his person. These tin foil packets were often used to package heroin and had also been seen by the informant in a drawer behind the bar. The bartender told the informant that heroin would be for sale on March 1, 1976. Based upon the informants information, on March 1, 1976, the court authorized a search of the Aurora Tap Tavern and "Greg" the bartender. Upon executing the search, the police frisked the patrons of the bar including the Defendant for weapons. While frisking the Defendant for weapons, the officer felt a cigarette pack with objects in

it. Approximately 10 minutes later the police conducted a second search of the Defendant where they removed the pack of cigarettes and found six packets of heroin inside this pack of cigarettes.

In the case at bar, the police were searching a private residence and not a public establishment. The affidavit for a search warrant also establishes that Mr. Bowers' was using his residence as a house where individuals could buy drugs. Within a three week period, an informant had purchased drugs at Mr. Bowers' residence on three different occasions. The affidavit also indicates Thomas M. Bowers normally conducts the illegal sale of drugs during the late evening hours past 8:00 p.m. The search of Mr. Bowers house took place at 11:45 p.m. when Mr. Bowers' house was open for business. Only seconds before the search was executed, Mr. Bowers sold a

police informant one-half ounce of cocaine for $1,000.00 in police money. The Defendant was present in the house while the sale took place and could have received proceeds from the sale of these drugs. Detective Crawford testified that he searched everyone in the house to find the police buy money:

> One of our primary concerns was the not letting any of our evidence get out of the house. When I found that there were six people present in the house, it became evident to us, that not knowing who might be a supplier or a buyer of drugs from Thomas Bowers, that we would conduct a search in an effort to retrieve the monies that were used in the drug purchase that night.
>
> We had photocopied the bills that were used in that particular drug purchase and what we were trying to do is recover that money, that was a main thing that we were looking for.

The State contends the Defendant cannot be compared to an innocent patron of a bar who happens to be at the wrong

place at the wrong time. The Defendant was at a house at 11:45 p.m. when drugs were normally sold. The Defendant was present in the house during a police drug operation where $1,000.00 of marked bills were left in this house in exchange for one-half ounce of cocaine. If the police did not search the Defendant, there is a possibility that the police would not recover valuable evidence. "The execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." (Footnotes omitted). Michigan v. Summers, 452 U.S. 692, 702 (1981).

This court's conclusion in Summers that narcotics searches may give rise to sudden violence or involve efforts to conceal evidence is inconsistent with this court's holding in Ybarra that

prevents narcotic officers from searching third parties for weapons or evidence.

In Summers, the court held in their syllabus that "for Fourth Amendment purposes, a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." In reaching this holding, this court balanced the individuals privacy interest from being detained against the law enforcement interest that justified the detention. Id. at 701-703. In determining whether a search is valid that is not based upon probable cause, this court must balance the intrusion on an individuals Fourth Amendment interests against the promotion of legitimate government

interests. Illinois v. Lafayette, 462 U.S. 640, 644 (1983). Applying this standard, the State contends the law enforcement interest in searching third parties outweighs the privacy interest of those individuals found in the dwelling that is the subject of the search.

First, the State contends that third parties have a lesser expectation of privacy under the Fourth Amendment since they are already detained of their liberty by the police. In United States v. Roberson, 414 U.S. 218 (1973) [Powell concurring], Justice Powell recognized that a person who is subject to a lawful custodial arrest has no legitimate expectation of privacy. Id. at 237. When the police have already deprived a third party of his liberty during the execution of a search warrant, the

government intrusion has already occurred and this person has a lesser expectation of privacy.

Balanced against this diminished expectation of privacy, law enforcement officers have a legitimate interest in preserving evidence that is the subject of the search warrant. In Ybarra, supra, Justice Rehnquist in his dissenting opinion recognized this governmental interest in preserving evidence:

> Nor, as a practical matter, could we require the police to specify in advance all persons that they were going to search at the time they execute the warrant. A search warrant is, by definition, an anticipatory authorization. The police must offer the magistrate sufficient information to confine the search but must leave themselves enough flexibility to react reasonably to whatever situation confronts them when they enter the premises. An absolute bar

> to searching persons not named in the warrant would often allow a person to frustrate the search simply by placing the contraband in his pocket. I cannot subscribe to any interpretation of the Fourth Amendment that would support such a result, and I doubt that this Court would sanction it if that precise fact situation were before it.
>
> Ybarra at 102. (Rehnquist Dissenting).

Since the police must generally knock and announce their presence before executing a search warrant, third parties could easily hide drugs or evidence on their person to thwart the search warrant. Also, persons who sell drugs and those that frequent drug houses are often armed and dangerous. Finally, the State notes that those persons found in homes where drugs are sold are often customers of those drug houses and will have controlled substances in their pockets for future

consumption or sale. The State maintains that the instant search was reasonable since the law enforcement interest outweighs the third parties expectation of privacy.

The State requests this Court to distinguish Ybarra on its facts and hold that where the police execute a search warrant for contraband or evidence of an illegal drug operation in a private home, that the police be allowed to search third parties located on the premises for contraband or weapons.

Applying the above holding to the instant case, the search in this case was proper. Detective Crawford testified that he conducted a quick pat down search for weapons as part of his search for the drug money:

> A. William Murphy was -- what we did was, we kept everybody in the room and one at a time we would bring them out and

> conduct a quick pat down search for any type of weapons and then a search for any of the money that may have been used in the drug buy that night.

Although Detective Crawford knew that the occupants of the house had already been quickly patted down for weapons when the police first entered the house, Detective Crawford was not present during this first pat down for weapons. The State contends Detective Crawford's frisk of the Defendant for weapons as part of his evidentiary search did not violate the Defendant's Fourth Amendment rights.

Assuming this pat down search was proper, the police had probable cause to look in the Defendant's cigarette pack since the Defendant jerked back when this cigarette pack was touched by the police. Based on the Defendant's actions, the police then had probable

cause to search this cigarette pack for drugs or for the drug money. The search of the Defendant was proper and did not violate the Defendant's constitutional rights.

SECOND REASON FOR GRANTING THE WRIT

THIS COURT SHOULD DETERMINE WHETHER THE GOOD FAITH EXCEPTION APPLIES IN WARRANTLESS CASES.

Assuming arguendo this Court finds that the instant search was improper, the State contends the exclusionary rule should not be applied since the police had a good faith belief that the search was proper in this case. United States v. Leon, 468 U.S. 897 (1984). Here, the State argued at the trial level and in the Ohio Ninth District Court of Appeals that the evidence should not be suppressed pursuant to the good faith exception to the search warrant requirement. The Ninth District Court of Appeals was hesitant to apply this exception because the search in this case was conducted outside of the warrant process.

There is confusion among the lower courts concerning whether the Leon decision is limited to warrant searches. See Hall, 13 Search and Seizure Law Report No. 1 (1986). The State contends the good faith exception can be applied to warrantless searches where the officers conducting the search had an objective reasonable belief that their search was proper. The exclusionary rule should not be applied to deter objectively reasonable law enforcement activity. Leon at 919.

In the case at bar, Detective Crawford searched the third parties in the house to find weapons and to find the police buy money that was left by the informant. Based upon the circumstances of this case, the State contends the police search was an objectively reasonable law enforcement activity. Therefore, the evidence

should not have been suppressed in this case pursuant to the good faith exception to the search warrant requirement.

CONCLUSION

The State's case presents two novel issues of law which should be decided by this Court. First, this Court should determine whether the police can search third parties during the execution of a search warrant for drugs in a private home. The State contends this type of search is not unreasonable under the Fourth Amendment. Assuming arguendo this Court rejects the above argument, the evidence should not be suppressed in this case pursuant to the good faith exception to the warrant requirement.

Respectfully submitted,

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Counsel for Petitioner

****

A P P E N D I X

****

THE SUPREME COURT OF OHIO
COLUMBUS

1988 TERM

To Wit: January 13, 1988

STATE OF OHIO :
Appellant, : Case No. 87-1988

v. : E N T R Y

WILLIAM E. MURPHY :
Appellee :

Upon consideration of the motion for leave to appeal from the Court of Appeals for Summit County, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Lynn C. Slaby.

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 13th day of January, 1988.

MARCIA J. MENGEL CLERK

RITA A. JOHNSON DEPUTY

STATE OF OHIO	)	IN THE COURT OF
	)SS:	APPEALS
COUNTY OF SUMMIT)		NINTH JUDICIAL DISTRICT
		C.A. NO. 13080
STATE OF OHIO	)	APPEAL FROM
	)	JUDGMENT ENTERED
Plaintiff-Appellant	)	IN THE COMMON
	)	PLEAS COURT
-vs-	)	COUNTY OF
	)	SUMMIT, OHIO
WILLIAM E. MURPHY	)	CASE NO.,
	)	CR 86 12 1590B
Defendant-Appellee	)	

DECISION AND JOURNAL ENTRY

Dated: September 30, 1987

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

GEORGE, J.

On December 5, 1986, a detective with the Cuyahoga Falls Police Department filed an affidavit for a search warrant for the residence of Thomas M. Bowers. The affidavit indicated that a reliable confidential informant spoke with

Bowers. Bowers offered to sell the informant one-half ounce of cocaine for $1000. The purchase was to be made at Bowers' residence. On two prior occasions, the informant had successfully made other controlled purchases of drugs from Bowers for the police. Upon the latest offer to sell drugs, the police supplied the informant with $1000 of marked money. The court issued a search warrant authorizing the police to search for illegally possessed drugs including marijuana and cocaine. The police were also authorized to search for drug related items including drug paraphernalia, money, miscellaneous records of illegal drug transactions and any other instrumentalities of illegal drug operations. The police were issued a nighttime search warrant based on information that Bowers normally

conducts illegal sales of drugs during the evening hours after 8:00 p.m.

At approximately 11:50 p.m., on December 5, 1986, the confidential informant purchased one-half ounce of cocaine from Bowers, at Bowers' residence, with $1000 of marked money supplied by the police. Immediately after the informant left Bowers' residence, the police executed the search warrant and converged on the house. After knocking on the door and announcing their presence, the police entered Bowers' residence to search his house.

Upon entering, the police found five other persons beside Bowers in the house. The defendant, William E. Murphy, was one of the individuals. The police detained all of the individuals in one room of the house, and conducted a pat down search on everyone, looking

for weapons. The police informed Bowers that they had a warrant for his arrest and also a warrant to search his house. The police waited twenty minutes until the detective arrived before conducting the search.

Upon his arrival, the detective searched each of the six people present to insure that all of the marked money would be recovered. When the detective searched the defendant, he felt a cigarette pack in the defendant's trouser pocket. When the pack was touched by the detective, the defendant jerked away. The package of cigarettes was removed from the defendant's pocket and a small amount of cocaine was found inside the package. The police then searched the other individuals without finding any of the marked money.

The police found the marked money laying on the floor underneath a desk in

the room where the individuals were gathered. In the subsequent search of the residence, the police seized several packages of cocaine, weights, weight scales, plastic baggies, marijuana, and various other drug paraphernalia.

The defendant was charged with one count of drug abuse in violation of R.C. 2925.11. After a hearing on the defendant's motion, the trial court suppressed the use of the evidence seized by the police. The state appeals, raising one assignment of error. This court affirms.

ASSIGNMENT OF ERROR

> "The trial court committed error in suppressing the evidence in this case."

The state contends that the trial court erred in finding that Ybarra v. Illinois (1979), 444 U.S. 85, is controlling in this case. Although the trial court did not set forth its

reasons for suppressing the evidence, it is clear from the arguments to the court on the motion to suppress, that the holding in Ybarra was the basis for the exclusion. In Ybarra, the United States Supreme Court suppressed evidence found on a patron of a tavern when the police executed a warrant to search the tavern premises and the bartender. The court held that, absent probable cause to believe that the patron had committed, was committing, or was about to commit an offense, the search of the patron contravened the Fourth and Fourteenth Amendments. Ybarra, supra, at 91, 92. The court found that the police had no probable cause to believe that any person, aside from the bartender, would be violating the law. There were no allegations in the complaint for the search warrant that the tavern was frequented by persons illegally

purchasing drugs, nor did the police know the patron or have reason to believe the patron was involved in any way.

The state contends that Ybarra is distinguishable from the case at bar in that the police here were searching a private residence rather than a public establishment, and the affidavit for the warrant alleged that Bowers was using his residence as a drug house where individuals could buy drugs. The state further argues that if the police had not searched the defendant and the others, there was a possibility that the marked money would not be recovered. The state's contentions are not well taken.

The fact that the police were searching a private residence rather than a public establishment would seem to provide further support for

suppressing the evidence rather than justifying its admission in this case. The defendant would have a greater expectation of privacy in a private home than in a public establishment. Although the court in State v. Schultz (1985), 23 Ohio App. 3d 130, permitted the introduction of evidence found on an individual during a warrant search of a private home, the court there found that the police knew the defendant and had probable cause to believe the defendant was engaged in drug trafficking. No such evidence exists here.

Although the police alleged that Bowers' residence was used as a drug house, they only sought a warrant to search the house and Bowers. The police made no request, nor provided the issuing judge with any evidence justifying the need to search any person found on the premises. The state admits

that the police did not know third parties would be present. Such an admission appears to be counter to the state's allegation that Bowers' residence was a drug house.

Finally, the state's argument that the search was necessary to insure that none of the marked money would be lost, is unsupported by the facts. Prior to conducting the search as permitted by the warrant, the police searched the third parties present in the house. Had the police first searched the areas and person permitted by the warrant, the money would have been discovered without having to interfere with the defendant's constitutional rights.

The state further contends that if the defendant's constitutional rights were violated, then the exclusionary rule should not be applied since the police had a good faith belief that the

search was proper. The good faith exception to the exclusionary rule generally applies to a situation in which the police officers seize items pursuant to a warrant subsequently invalidated because of an error on the part of the issuing judge. United States v. Leon (1984), 468 U.S. 897; State v. Gerace (Feb. 19, 1986), Summit App. No. 12177, unreported. The United States Supreme Court in Leon, supra, reasoned that the purpose of the exclusionary rule, i.e. to deter the police from violating constitutional rights, is not served when a judge makes an error in issuing a warrant and the police reasonably rely on the validity of the warrant.

Here, the search of the defendant was not made pursuant to the warrant, nor was the warrant subsequently invalidated. The state's contention

that the police had a good faith belief that the search was proper is not supported by the evidence. The search would have been proper had the police sought and obtained a more inclusive search warrant. However, here the extent of the search warrant did not include the search of third parties who may be present. Additionally, there is no testimony by any of the police officers who performed the search that they believed the search warrant permitted a search of third parties.

There was also no evidence asserting any basis for probable cause to search the defendant. Had the police been able to articulate a reason to justify the search of the defendant, the search would have been proper. It should be noted that the police, upon entering Bowers' residence, conducted a pat down search for weapons on all those present.

This limited search was permissible in order to ensure the safety of the officers. Terry v. Ohio (1968), 392 U.S. 1. Had the defendant jerked away from the officers at this time, as he did when the detective conducted the later search for the money, the police would have been justified in searching the defendant further. However, this did not happen. The only reason stated for the search was the fear of the officers in losing the marked money. Such a belief is insufficient to support an objectively reasonable belief on the part of the police officers that the search was proper. See Leon, supra at 926. Accordingly, the state's assignment of error is overruled and the judgment of the trial court is affirmed.

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The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the Summit County Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

JOYCE J. GEORGE
FOR THE COURT

MAHONEY, P.J.
CACIOPPO, J.
CONCUR

APPEARANCES:

PHILIP D. BOGDANOFF, Assistant Prosecuting Attorney, City County Safety Bldg., 53 East Center St., Akron, OH for Appellant.

STEPHEN D. HARDESTY, Attorney at law, 1010 CitiCenter Bldg., 146 S. High St., Akron, OH 44308 for Appellee.

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

JANUARY Term 1987

THE STATE OF OHIO	)	No. CR 86-12-1590
	)	
vs.	)	
	)	
(B) WILLIAM E. MURPHY	)	JOURNAL ENTRY
	)	
	)	

THIS DAY, to-wit: The 12th day of March, A.D., 1987, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, WILLIAM E. MURPHY, being in Court with counsel, STEVEN HARDESTY, for a hearing on the Defendant's Motion to Suppress.

Upon due hearing and consideration of this Court, IT IS HEREBY ORDERED that the Defendant's Motion herein be GRANTED.

APPROVED:
March 13, 1987
dle

JAMES P. WINTER, JUDGE

Court of Common Pleas
Summit Count, Ohio

cc: Prosecutor Nancy Kelley
Criminal Assignment
Attorney Steven Hardesty

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions Involved

U.S. Const., Amend. IV

The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Section 2925.11 [Drug abuse.]

(A) No person shall knowingly obtain, possess, or use a controlled substance.

(B) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with chapters 3719., 4715., 4729., and 4731.and 4741. of the Revised Code. This section does not apply to any person who obtained the controlled substance pursuant to a prescription issued by a practitioner, where the drug is in the original container in which it was dispensed to such person.

(C) Whoever violates this section is guilty of drug abuse:

(1) If the drug involved is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, drug abuse is a felony of the fourth degree, and if the offender has previously been convicted of a drug abuse offense, drug abuse is a felony of the third degree.

(2) If the drug involved is a compound, mixture, preparation, or substance included in schedule III, IV, or V, drug abuse is a misdemeanor of the third degree, and if the offender has previously been convicted of a drug abuse offense, drug abuse is a misdemeanor of the second degree.

(3) If the drug involved is marihuana, drug abuse is a misdemeanor of the fourth degree, unless the amount of marihuana involved is less than one hundred grams, the amount of marihuana resin, or extraction or preparation of such resin, is less than five grams, and

the amount of such resin in a liquid concentrate, liquid extract, or liquid distillate form, is less than one gram, in which case drug abuse is a minor misdemeanor.

(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

HISTORY: 138 vS 184, Section 5. Eff 6-20-84.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

CASE NO. 87-1559 (2)

FILED
APR 4, 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF OHIO

Petitioner

V.

William E Murphy

Respondent

RESPONDENT'S BRIEF IN OPPOSITION

14

QUESTIONS PRESENTED

Whether this Court should limit **Ybarra v. Illinois**, 444 U.S. 85 (1979), and retreat to a view that the Fourth Amendment protects places and not people?

Whether this Court should substitute a test of subjective good faith for that of objective good faith in warrantless seizure cases, thereby eviscerating the fundamental protections afforded by an objective finding of probable cause in warrantless seizures?

LIST OF PARTIES

Pursuant to Rules of the Supreme Court of the United States, Rule 21(1)(b), the parties to this case are listed below:

Counsel for Petitioner The State of Ohio, PHILLIP D. BOGDANOFF, Assistant Prosecuting Attorney, 53 East Center Street, Akron, Ohio 44308.

Counsel for Respondent William E. Murphy [1825 Schiller Street, Cuyahoga Falls, Ohio 44221], STEPHEN D. HARDESTY, 1010 CitiCenter Building, 146 South High Street, Akron, Ohio 44308; and J. DEAN CARRO, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325.

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CASE NO. 87-1558

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF OHIO,

Petitioner,

-vs-

WILLIAM E. MURPHY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND
HONORABLE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

The Respondent, WILLIAM E. MURPHY, respectfully requests that this Court deny the State's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondent Murphy agrees with the State's recitation of the facts in this case.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THIS COURT'S DECISION IN **YBARRA V. ILLINOIS**, 444 U.S. 85 (1979), SERVES TO PROTECT EXPECTATIONS OF PRIVACY OF ANY INDIVIDUAL ON ANY PREMISE WHERE A SEARCH WARRANT IS EXECUTED. AS SUCH, THE STATE'S CONTENTIONS ARE WITHOUT MERIT.

The State of Ohio seeks to interest this Court to accept this case on two grounds. First, that **Ybarra v. Illinois**, 444 U.S. 85 (1979), does not apply to the search of innocent third parties merely present in a private dwelling when a search warrant is executed. Essentially, the State seeks to distinguish this Court's holding in **Ybarra, supra**, on the grounds that the search here was in a private dwelling and not a public place as in **Ybarra, supra**. The State also collaterally argues that persons found on the private premises, during the execution of a search warrant, somehow have a lowered expectation of privacy. Second, the State argues that a "good faith" exception should be recognized when a police officer violates established precedent by this Court as long as the officer "believes" the search to be proper. Basically, the State seeks to substitute a subjective good-faith exception for the well-recognized objective good-faith exception.

In response, Respondent Murphy submits that acceptance of the State's first position would focus inquiry on the nature of the place where the person is searched rather than focusing on the individual's expectation of privacy in the sanctity of his person. Second, to allow a subjective good-faith exception under these circumstances would contravene the very doctrine of good-faith exceptions created by this Court and eviscerate the meaning and purpose of the probable cause requirement.

The starting point for consideration here must be this Court's decision in **Ybarra v. Illinois, supra.**[1] The facts of **Ybarra** are strikingly similar to those at bar. In both cases, police obtained search warrants to arrest an individual and search a place for contraband. In **Ybarra, supra**, the warrant allowed a search of a public place. **Id.** at 88. In the case at bar, the warrant designated the place to be searched, which was a private residence. In both cases, individuals were present at the time of the execution of the warrant who were not named in the warrant and who did not manifest either suspicious behavior or an attempt to conceal items. **See Ybarra** at 90 (State Court of Appeals Decision at 6; Appendix to Petition for Writ of Certiorari at 45).

Finally, in both cases the police officers conducted one frisk or pat-down followed by a second frisk which yielded contraband. **Ybarra** at 88-89 (Court of Appeals Decision at 2-3; Appendix to Petition for Writ of Certiorari at 37-38).

The State, in **Ybarra**, sought to justify the first frisk by relying on **Terry v. Ohio**, 392 U.S. 1 (1968). The Court rejected that attempt by finding that even a **Terry** limited stop required some "reasonable belief that [Ybarra] was armed and presently dangerous." **Ybarra** at 93. Since the State was unable to "articulate any specific fact that would have justified" this suspicion, the initial frisk was unsupportable. **Id.**

The underlying foundation for the holding in **Ybarra** was that a person's mere proximity to criminal activity without more will not establish probable cause. In the absence of probable

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[1] It is interesting to note that when the State cites to and discusses the facts of **Ybarra**, it cites to the Court's "syllabus." (Petition for Writ of Certiorari at p. 13) While the syllabus states the law of the case in Ohio Supreme Court decisions, the same is not true with the syllabi in this Court's decisions. **See, e.g. Perkins v. Benguet Mining Co.**, 342 U.S. 437, 441 N. 3 (1952); **United States v. Detroit Lumber Co.**, 200 U.S. 321, 337 (1905).

cause, "particularly with respect to that person" searched, the person's legitimate expectation of privacy is preserved and no search may occur. If a search does occur, the fruits of the search must be suppressed. **Id.** at 91.

The position the State advocates here would allow the police to search <u>any</u> person present on the premises to be searched without probable cause. This Court has never advocated such an approach, and the State suggests no valid policy consideration for the Court to rely upon in adopting this position. The State has not suggested that the Supreme Court of Ohio has decided a federal question in conflict with any other state court of last resort, or with a federal court of appeals. See Rules of the Supreme Court of the United States, Rule 17(1)(b).

What the State seeks to achieve here is a reworking of fundamental predicates of Fourth Amendment search and seizure law. Basically, the State suggests that **Ybarra** should be distinguished from the case at bar due to the fact that the place searched here was a <u>private</u> dwelling (Petition for writ of Certiorari at 24). The State suggests then that this Court's focus should be on the nature of the place searched. This position is unsupportable. At least since 1967, this Court has consistently declined to adopt such a view. In **Katz v. United States**, 389 U.S. 347 (1967), the Court held:

> ". . . the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. **Id.** at 351-52.

Unless this Court desires to overrule **Katz v. United States, supra**, and its many progeny, the State's position is untenable.

II.

TO MAINTAIN THE CONSTITUTIONAL INTEGRITY OF THE GOOD FAITH EXCEPTION, THIS COURT MUST CONTINUE TO RECOGNIZE AN OBJECTIVE STANDARD.

The State next contends that this Court should extend its recent adoption of a good-faith exception to a warrantless search "where the officers conducting the search had an objective reasonable belief that their search was proper." Petition for Writ of Certiorari at 28. By this argument, the State grossly misperceives the protections afforded by the Fourth Amendment; the purpose of probable cause; and the significance of the good-faith exception.

This Court has recognized a good-faith exception to the exclusionary rule in only two limited situations. In **United States v. Leon**, 468 U.S. 897 (1983), the Court recognized this exception when police officers acted upon a "search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." **Id.** at 900. The second situation, as found in **Illinois v. Krull**, ___ U.S. ___, 107 S.Ct. 1160 (1987), exists when a warrantless search occurs pursuant to a state statute which, at the time of the search, is facially constitutional, but is later declared to be unconstitutional. **Id.** at 1170.[2]

As this Court emphasized in **Leon, supra**, and again in **Krull, supra**, the decision to find a good-faith exception is directly related to the purpose to be served by the exclusionary rule. Initially, it is well established that the exclusionary rule is not constitutionally mandated and is not intended to create a personal constitutional right on behalf of the aggrieved party. Rather, it is a "judicially created remedy

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[2] In light of this Court's decision in **Krull, supra**, the State's assertion that there is "confusion among the lower courts concerning whether the **Leon** decision is limited to warrant searches" is curious (Petition for Writ of Certiorari at 26).

designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ." **United States v. Leon** at 906, quoting **United States v. Calandra**, 414 U.S. 338, 348 (1974). This focus on the deterrent purpose of the exclusionary rule prompted the Court to evaluate the cost and benefit of suppression of evidence. In this regard, the Court considered three factors:

> "1) First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.
>
> "2) Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.
>
> "3) Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate." **Leon, supra** at 916.

The Court was quick to note, however, that any good-faith exception was to be determined objectively, and not subjectively. **See Leon, supra** at 915, n. 13, citing **Henry v. United States**, 361 U.S. 98, 102 (1959).

> "good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."

The Court took additional pains to emphasize that the "standard of reasonableness we adopt is an objective one." **Leon, supra**, at 919, n. 20. The Court also noted that "the objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits." **Id. See also Leon** at 922, n. 23; **Illinois v. Krull**, 107 S.Ct. at 1170.

Application of these principles to the case at bar demonstrates that the establishment of a subjective good-faith exception would effectively eviscerate the Fourth Amendment. In the two cases where the Court has found a good faith expansion, it has only done so where the objective circumstances presented to the police permitted a finding of proper, lawful behavior. In the case at bar, the State would place a premium on a police officer's ignorance and allow for a good-faith exception where the officer believed he or she was acting properly. Thus, an officer who, through ignorance, did not know of certain constitutional protections would be permitted to violate a defendant's rights whereas a conscientious officer, acting in compliance with constitutional protections, would not be able to shield himself or herself. Probable cause is an objective test based upon the facts known to the officer at the time. An officer is presumed to know the law. A good-faith exception on the basis of a misapplication of long-standing constitutional precedent would be a contradiction in terms. It cannot be allowed.

Neither has the State demonstrated that the State Court of Appeals has decided this issue in any way which is inconsistent with **Ybarra v. Illinois, supra.** **See**, Rules of the Supreme Court of the United States, Rule 17(1)(c).

Applying the **Leon** factors to the case at bar further demonstrates the inapplicability of a good-faith exception on the facts presented. In this case, the police officers had no warrant to arrest or authority to search Respondent Murphy. No "detached and neutral" magistrate had issued an order allowing such actions. Thus, under the first **Leon** criterion, the misconduct here was solely that of the police.

Applying the second **Leon** criterion, the police themselves made the decision to violate this Court's holding in **Ybarra**,

supra. They cannot point to any objective authorization that could have been interpreted by them to allow this search.

Finally, exclusion of the evidence here is exactly the situation the exclusionary rule was meant to effect. The action here was solely that of the police and clearly unconstitutional. Hopefully, the exclusion of the evidence here will deter the police in the City of Akron from violating this Court's clear holdings.

CONCLUSION

As a result of the above arguments, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

(Separate Pleading)

NO. 87-1558

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF OHIO
Petitioner

-vs-

WILLIAM E. MURPHY
Respondent

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF OHIO
Petitioner

-vs-

WILLIAM E. MURPHY
Respondent

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FIRST REASON FOR GRANTING THE WRIT

THIS COURT SHOULD DETERMINE WHETHER THE HOLDING OF YBARRA V. ILLINOIS, 444 U.S. 85 (1979) APPLIES TO WARRANT SEARCHES OF PRIVATE HOMES WHERE THE DEFENDANT IS SELLING DRUGS FROM HIS HOME TO THIRD PARTIES.

The Defendant in his brief in opposition does not challenge the primary premise of the State's argument that the law enforcement interest

outweighs a third party's privacy interest when executing a search warrant for narcotics. Rather, he points to the similarities between the instant case and Ybarra v. Illinois, 444 U.S. 85 (1979). Also, he emphasizes that the place of the search, a private home rather than a public bar, has no constitutional significance.

However, the main focus of the State's argument in this case is that the law enforcement interest of the police outweighs the Defendant's privacy interest. Therefore, a search can be made in this case absent probable cause. The court in Ybarra did not consider this issue since that court held a search of third parties could not be made absent probable cause. However, in light of the court's holding in Michigan v. Summers, 452 U.S. 692 (1981) which permits a seizure of third parties

without probable cause, this court should consider the issue of whether a search of third parties without probable cause is reasonable under the Fourth Amendment. The Fourth Amendment protects people, not places, and wherever an individual may harbor a reasonable expectation of privacy, he is entitled to be free from unreasonable governmental intrusion. U.S. v. Dionisio, 410 U.S. 1, 8 (1973). Whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case. Cady v. Dombrowski, 413 U.S. 433, 440 (1973).

The State contends this court should accept certiorari in the case to determine whether the instant search was reasonable under the Fourth Amendment.

SECOND REASON FOR GRANTING THE WRIT

THIS COURT SHOULD DETERMINE WHETHER THE GOOD FAITH EXCEPTION APPLIES IN WARRANTLESS CASES.

The defendant in his brief in opposition misinterprets the State's arguments and indicates the State is requesting this Court to adopt a subjective Good Faith exception to the Fourth Amendment. The State has not asserted a subjective Good Faith standard. Rather, the State requests this court to adopt a Good Faith exception to police conduct which is objectively reasonable considering the facts and circumstances presented to the police at the time they made their search. In Maryland v. Garrison, ___ U.S. ___ 107 S.Ct. 1013 (1987), this court held that the search of an apartment not named in a warrant was permissible where the police officers

mistakenly believed their search was authorized by the warrant. This court refused to suppress evidence found in the defendant's apartment because the police action was "objectively understandable and reasonable" Id. at 1019. In U.S. v. Leon, 468 U.S. 897, 919 (1984), this court cited U.S. v. Peltier, 422 U.S. 531, 542 (1975) and stated:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

In order to determine whether the Good Faith exception applies in this case, this court should consider the issue of whether the police knew or should have known their search was

illegal. The State contends the instant facts were sufficiently distinguishable from Ybarra v. Illinois, 444 U.S. 85 (1979) that the police could reasonable believe that Ybarra was not controlling.

In Ybarra, the court emphasized that there was nothing in the affidavit to indicate that the bartender was selling drugs to third parties. Id, at 90. Here, the affidavit indicated the homeowner was selling drugs from his house and a police informant was going to make his fourth purchase of drugs with $1,000 of police money immediately preceding the search. The affidavit for the search warrant emphasized the need to prevent the dispersal of the police money:

> It will be necessary to 'immediately' conduct a search of the entire residence and surrounding premises of the stated residence following the aforementioned sale of Cocaine for the sum of one-thousand

> dollars ($1,000.00) in order to prevent the said THOMAS M. BOWERS from disposing in any manner, of the U.S. Currency in the amount of one-thousand dollars ($1,000.00) which will be used as evidence following such "controlled drug-purchase" and, any other illegally-possessed items, paraphernalia, records, weapons, or money utilized in an illegal drug-operation which, if located will be used as evidence in the criminal prosecution of the said THOMAS M. BOWERS.

The defendant was unexpectedly in the house during the drug sale and the police believed they had to search him in order to prevent the loss of the police buy money.

Based upon the facts of this case, the State contends the instant search was objectively reasonable. Also, since the facts of this case are distinguishable from Ybarra, the police did not know or should have known that their search was prohibited under the Fourth Amendment. Therefore, the

evidence should not be suppressed pursuant to the Good Faith exception to the search warrant requirement.

CONCLUSION

Based on the foregoing argument, the State contends the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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